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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 ERIC WRIGHT, individually and in
8 his capacity as personal representative
9 of the ESTATE OF STEVEN O.
10 WRIGHT; and AMY SHARP,
11 individually,

12 Plaintiffs,

13 v.

14 UNITED STATES OF AMERICA;
15 MEDFORD CASHION, M.D.; STAFF
16 CARE, INC.,

17 Defendants.

NO: 2:15-CV-0305-TOR

ORDER GRANTING DEFENDANT
UNITED STATES OF AMERICA'S
MOTION FOR SUMMARY
JUDGMENT

18
19 BEFORE THE COURT is Defendant United States of America's Motion for
20 Summary Judgment (ECF No. 94), Motion to Exclude (ECF No. 107) and
corresponding Motion to Expedite (ECF No. 108). These matters were submitted
without oral argument. The Court has reviewed all the briefing and files herein,
and is fully informed.

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT ~ 1

1 For the reasons discussed below, Defendant's Motion for Summary
2 Judgment (ECF No. 94) is **GRANTED**; Defendant's Motion to Exclude (ECF No.
3 107) and Expedite (ECF No. 108) are **DENIED AS MOOT**.

4 **BACKGROUND**¹

5 Eric Wright visited the Emergency Department at the VA medical center and
6 hospital in Spokane, Washington on August 2, 2014. Mr. Wright came to the
7 hospital complaining of knee pain resulting from a fall approximately one week
8 earlier. ECF No. 84 at ¶¶ 3.1-3.2. Mr. Wright came to the hospital using a crutch
9 and was further able to ambulate without other assistance during his stay at the
10 hospital. *See* ECF No. 100 at ¶¶ 6, 9. After a series of tests lasting most of the
11 day, Mr. Wright was discharged from the hospital. ECF No. 100 at ¶ 9.

12 While Mr. Wright was waiting in the hospital for his ride home, Karla
13 Linton, LPN, despite seeing Mr. Wright was ambulating on his own accord,
14 informed Mr. Wright that she would escort him out of the hospital via wheelchair
15 when his friend arrived to take him home. ECF No. 95-2 at 118. While Mr.
16 Wright was leaving the hospital, Nurse Linton twice repeated her offer to help
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19 ¹ Unless otherwise noted, the underlying facts are not in dispute. *Compare*
20 ECF Nos. 94; 95, *with* ECF Nos. 97; 102.

1 escort Mr. Wright via wheelchair, which he refused.² ECF No. 95-2 at 118. Upon
2 leaving the hospital, Mr. Wright fell and hit his head. ECF No. 84 at ¶¶ 3.7-3.8.

3 Mr. Wright was readmitted and Dr. Cashion examined his head injury.
4 Elizabeth Ford, RN, was the charge nurse and assisted Dr. Cashion with Mr.
5 Wright's further examination. ECF No. 84 at ¶ 3.9. Nurse Linton became aware
6 of Mr. Wright's fall and injury and, worried about blood thinning medication given
7 to Mr. Wright, Nurse Linton told Nurse Ford that she believed Mr. Wright should
8 be given a CT scan and should remain at the hospital overnight for observations.
9 ECF No. 84 at ¶¶ 3.11-12. Nurse Ford also believed Mr. Wright needed a CT scan
10 and that he should remain at the hospital, and she discussed this option with Dr.
11 Cashion. ECF No. 84 at ¶¶ 3.13. Dr. Cashion reviewed the file and chose to
12 discharge Mr. Wright. ECF No. 84 at ¶ 3.6.

13 Plaintiffs contend that nurses Linton and Ford did not do enough to meet the
14 standard of care and that Defendant United States of America is liable for their
15 conduct under the Federal Tort Claims Act.

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18 ² Plaintiffs' bald assertion that Nurse Linton may have been mistaken as to
19 this point, *see* ECF No. 99 at 11, does not create a genuine issue. *See Anheuser-*
20 *Busch, Inc. v. Nat. Beverage Distributors*, 69 F.3d 337, 345 (9th Cir. 1995).

STANDARD OF REVIEW

The Court may grant summary judgment in favor of a moving party who demonstrates “that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In ruling on a motion for summary judgment, the court must only consider admissible evidence. *Orr v. Bank of America, NT & SA*, 285 F.3d 764 (9th Cir. 2002). The party moving for summary judgment bears the initial burden of showing the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party to identify specific facts showing there is a genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). “The mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.” *Id.* at 252. For purposes of summary judgment, a fact is “material” if it might affect the outcome of the suit under the governing law. *Id.* at 248. An issue is “genuine” where the evidence is such that a reasonable jury could find in favor of the non-moving party. *Id.* The Court views the facts, and all rational inferences therefrom, in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007). However, “where the ultimate fact in dispute is destined for decision by the court rather than by a jury, there is no reason why the court and the parties

1 should go through the motions of a trial if the court will eventually end up deciding
2 on the same record.” *TransWorld Airlines, Inc. v. Am. Coupon Exch., Inc.*, 913
3 F.2d 676, 684 (9th Cir. 1990).

4 DISCUSSION

5 Plaintiffs’ medical negligence claim against Defendant is based on two
6 arguments: (1) Nurse Linton did not meet the standard of care when she offered
7 Mr. Wright assistance, contending Nurse Linton had a duty to “insist” and try to
8 “convince” Mr. Wright that he should accept wheelchair assistance and (2) Nurse
9 Ford did not meet the standard of care when she discussed the possibility of giving
10 Mr. Wright a CT scan with Dr. Cashion, contending she should have done more.
11 *Compare* ECF Nos. 94; 104, *with* ECF Nos. 97; 106.

12 A cause for medical negligence generally requires expert testimony to
13 establish the standard of care and causation. *Harris v. Robert C. Groth, M.D., Inc.*,
14 *P.S.*, 99 Wash. 2d 438, 449 (1983); *Frausto v. Yakima HMA, LLC*, 393 P.3d 776,
15 779 (2017). The crux of Defendant’s request for summary judgment is that
16 Plaintiffs’ expert testimony is inadequate and is not sufficient to survive summary
17 judgment. Defendants reason that the testimony rests on the *ipse dixit* of the
18 expert; is devoid of any support or explanation; and that the testimony is not a
19 product of reliable principles or methods.

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1 Rule 702 of the Federal Rules of Evidence governs the admission of expert
2 testimony. Per Rule 702, a “witness who is qualified as an expert by knowledge,
3 skill, experience, training, or education may testify in the form of an opinion” only
4 if:

- 5 a) the expert’s scientific, technical, or other specialized knowledge will help
the trier of fact to understand the evidence or to determine a fact in issue;
- 6 b) the testimony is based on sufficient facts or data;
- 7 c) the testimony is the product of reliable principles and methods; and
- 8 d) the expert has reliably applied the principles and methods to the facts of the
case.

9 Fed. R. Evid. 702.

10 Defendant is correct—Nurse O’Neill’s declaration states that her opinion is
11 based on her training, experience, and knowledge, but otherwise does not provide a
12 basis for the proposed standard of care or any explanation other than a bald
13 conclusion that nurses Linton and Ford’s conduct fell below the standard of care by
14 failing to do more. *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1319 (9th
15 Cir. 1995) (“We’ve been presented with only the experts’ qualifications, their
16 conclusions and their assurances of reliability. Under *Daubert*, that’s not
17 enough.”); *see Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (“nothing in
18 either *Daubert* or the Federal Rules of Evidence requires a district court to admit
19 opinion evidence that is connected to existing data only by the *ipse dixit* of the
20 expert. A court may conclude that there is simply too great an analytical gap

1 between the data and the opinion proffered.”); *see also Johnson v. Kelly*, 2017 WL
2 1838140, at *4 (W.D. Wash. May 8, 2017) (“the court cannot conclude that a non-
3 scientific expert’s proffered testimony is reliable unless the expert explains the
4 manner in which her knowledge and experience support her conclusions.”).
5 Without an adequate expert opinion on this point, Defendant is entitled to summary
6 judgment.

7 Even accepting Nurse Linton had a duty to insist and attempt to persuade, as
8 Plaintiffs’ expert baldly asserts, ECF No. 101 at ¶¶ 11-13, Nurse Linton met this
9 duty. Nurse O’Neill’s declaration fails to note that Nurse Linton offered
10 wheelchair assistance to Mr. Wright not once, but three times, and fails to explain
11 why this was not enough. ECF No. 97-2 at ¶ 6. Nurse Linton’s conduct is
12 tantamount to an insistence and a reasonable attempt to persuade Mr. Wright,
13 especially in light of the uncontroverted fact that Mr. Wright was able to
14 successfully ambulate the week before visiting the hospital and during his visit of
15 the hospital. The opinion that a reasonable nurse would have done more is
16 completely unsupported. Nurse O’Neill’s assertion that Mr. Wright would be
17 amenable to persuasion is further outside of Nurse O’Neill’s area of expertise.

18 As for Nurse Ford, Nurse O’Neill opines that a nurse has a duty to advocate
19 for appropriate care and must go up the chain of command to ensure the patient’s
20 care where the nurse believes the patient’s safety may be in jeopardy. ECF No.

1 101 at ¶ 14. Even accepting Nurse O’Neill’s opinion that a nurse has a duty to
2 advocate for proper care, Nurse Ford met this standard by discussing additional
3 testing with Dr. Cashion, who determined neither were necessary. Nurse O’Neill’s
4 opinion, if counted as true, would render a nurse liable because she disagreed with
5 the doctor and did not go above the doctor for a second opinion. This is not the
6 law in Washington:

7 Like pharmacists, nurses do not owe a duty to patients that would place them
8 in a position to second-guess the physician or otherwise substitute their
9 judgment in place of that provided by the physician.

10 Duty of nurses, 16 Wash. Prac. Tort Law And Practice § 16:21 (4th ed.) (citations
11 omitted); *see also Silves v. King*, 93 Wash. App. 873, 883–84 (1999) (“Mr. Silves
12 also argues that the nurse had a duty to consult with Dr. King about the potentially
13 harmful effects of indomethacin. We decline to impose such a duty here, for the
14 reasons earlier discussed as to whether the pharmacist had such a duty: the
15 prescription contained no clear error or mistake. We also doubt the propriety of
16 imposing on a discharge nurse the duty to recognize such an error or mistake even
17 if it exists, but we need not address that issue here.”).

18 Plaintiffs have not met their burden in establishing a genuine issue of fact
19 and Defendant has demonstrated it is entitled to summary judgment on all claims.

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DISMISSING REMAINING CLAIMS

Plaintiffs asserted federal jurisdiction under the Federal Tort Claims Act based on their claim against United States of America for Nurse Linton and Nurse Ford's allegedly negligent conduct. ECF No. 84 at ¶ 1.1. Plaintiffs' remaining claims against Dr. Cashion and Staff Care were entertained under pendent jurisdiction. ECF No. 84 at ¶ 1.3. As discussed above, the claims on which federal non-pendent jurisdiction were premised fail. This gives rise to the question of whether it would be proper to allow the remaining claims to proceed in federal court or whether they should be dismissed with leave to file suit in state court.

Generally, a district court will dismiss an action based solely on pendent jurisdiction when the remaining claims are dismissed. As the Supreme Court has noted:

[P]endent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.

United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966) (footnotes omitted). "Under *Gibbs*, a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience,

1 fairness, and comity in order to decide whether to exercise jurisdiction over a case
2 brought in that court involving pendent state-law claims.” *Carnegie-Mellon Univ.*
3 *v. Cohill*, 484 U.S. 343, 350 (1988). “When the balance of these factors indicates
4 that a case properly belongs in state court, as when the federal-law claims have
5 dropped out of the lawsuit in its early stages and only state-law claims remain, the
6 federal court should decline the exercise of jurisdiction by dismissing the case
7 without prejudice.” *Id.* (footnote removed).

8 Plaintiffs claim accrued on August 2, 2014, at the earliest. *See* ECF No. 84
9 at ¶ 3.2. The statute of limitations for a personal injury action in Washington is
10 three years. RCW 4.16.080(2); *Deggs v. Asbestos Corp. Ltd.*, 188 Wash. App. 495,
11 499 (2015). Moreover, 28 U.S.C. § 1367(d) provides for the tolling of the period
12 of limitations while these supplemental claims were pending and for 30 days after
13 they are dismissed. Trial has not begun and all discovery can be rolled over into a
14 state court action. There does not appear to be any substantial prejudice
15 outweighing the general tendency to dismiss pendent actions when only state-law
16 claims remain.

17 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 18 1. Defendant’s Motion for Summary Judgment (ECF No. 94) is **GRANTED**;
19 2. Defendant’s Motion to Exclude (ECF No. 107) and Expedite (ECF No. 108)
20 are **DENIED AS MOOT**.

1 3. The remaining claims are **DISMISSED WITH LEAVE TO FILE SUIT**
2 **IN STATE COURT.**

3 The District Court Clerk is directed to enter this Order, and Judgment
4 accordingly, provide copies to counsel, and **CLOSE** the file.

5 **DATED** June 14, 2017.



THOMAS O. RICE
Chief United States District Judge